

NOT FOR COMMERCIAL PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION



In re:) Case No. 08-17408
)
JOHN V. GENDRICH and) Chapter 13
JANA A. GENDRICH,)
) Judge Pat E. Morgenstern-Clarren
Debtors.)
) **MEMORANDUM OF OPINION**¹

The chapter 13 trustee objects to confirmation of the debtors’ plan because their form 22C includes expenses for non-residential real estate that they intend to surrender. The debtors John and Jana Gendrich ask that their plan, as filed, be confirmed because the expenses are proper and they are committing all of their projected disposable income to unsecured creditors. For the reasons stated below, the trustee’s objection is sustained, and confirmation is denied.

I. JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A) and (L).

II. FACTS AND PROCEDURAL BACKGROUND

The debtors and the trustee submitted this issue to the court for decision on briefs² and these stipulated facts:

¹ In the court’s view, the value of this opinion is to decide the dispute between the parties, rather than to add anything to the general bankruptcy jurisprudence. For that reason, the opinion is not intended for commercial publication.

² Docket 29, 30, 33.

1. Debtors' initial schedules are accurate as filed with the exception of schedules I and J.
2. Debtors' amended schedules I and J are accurate.
3. Debtors are surrendering the [non-residential] real property located at 523 Harris Rd., Richmond Hts., OH.
4. Debtor's employer purchased a vehicle replacing the leased vehicle and therefore contrary to the notation on Amended Schedule J, financing a new vehicle will not be required.

Amended schedules I and J show monthly income of \$5,327.00 and expenses of \$4,405.00, which results in net monthly income of \$922.00. The debtors' schedule J reflects monthly expenses for their residence, located at 19195 Abby Avenue, Euclid, Ohio, of \$910.00 for the note secured by a mortgage on their residence, \$45.00 for homeowner's insurance, and \$185.00 for property taxes. The amended schedules do not include income or expenses for the Harris property. However, on lines 47b and 48b of form 22C, the debtors deducted the monthly payment owed to Homeq on a note secured by a mortgage on the Harris property and the arrearages on that obligation, respectively (collectively, the Harris property expenses). Form 22C also shows that the debtors have current monthly income of \$7,860.99, which annualized, is above the median income for a family of five in Ohio.

The debtors propose a monthly plan payment of \$922.00, which would result in a 2% distribution to unsecured creditors.

III. POSITIONS OF THE PARTIES

The trustee contends that the expenses for property that is being surrendered may not be included on form 22C, which means that \$976.75 reported on line 47b and \$154.67 reported on line 48b should be removed. When those amounts are deleted, according to the trustee, the debtors are not committing all of their projected disposable income to repay their unsecured

creditors. Because the debtors do not intend to pay the Harris property expenses, the trustee argues that at confirmation, that debt will no longer be “scheduled as contractually due” within the meaning of 11 U.S.C. § 707(b)(2)(A)(iii). Because the debt will not be “contractually due” under the trustee’s interpretation of the statute, the expenses are not reasonably necessary for the maintenance or support of the debtors or their dependents. If the expenses are not reasonably necessary, the trustee argues that there is no need to refer to § 707(b)(2) to determine the *amount* of any such expenses.

The debtors claim that their expense deductions for the Harris property are proper, arguing that collateral does not have to be retained in order for expenses related to it to be included in form 22C. Instead, the debtors contend that the expenses for the Harris property are “contractually due” within the meaning of 11 U.S.C. § 707(b)(2)(A)(iii); therefore, the expenses are properly included in the form 22C calculation of disposable income.

IV. DISCUSSION

A. Confirmation Requirements

Because the trustee objected to confirmation, the debtors’ plan cannot be approved unless, as of confirmation, “the plan provides that all of the debtor’s projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan.” 11 U.S.C. § 1325(b)(1)(B). Disposable income for above median income debtors is calculated by subtracting the “specific expenses enumerated in § 707(b)(2)(A) and (B)” from current monthly income (defined at 11 U.S.C. § 101(10A)). 11 U.S.C. § 1325(b)(2)(A)(i); *Hildebrand v. Petro (In re Petro)*, 395 B.R. 369, 374 (B.A.P. 6th Cir. 2008). There is debate over the extent to which the defined term “disposable income” is used to calculate a debtor’s “projected disposable

income” for purposes of 11 U.S.C. § 1325(b)(2). The Bankruptcy Appellate Panel for the Sixth Circuit recently held that, for an above median income chapter 13 debtor:

A debtor’s projected disposable income should be calculated based on the realities of the debtor’s circumstances as of confirmation and as reasonably anticipated to be during the length of the plan.

Id. at 378. Although BAP opinions are not binding on bankruptcy courts in the same circuit, the court chooses to follow the *Petro* holding in this context. As a result, the court will consider whether the debtors’ surrender of the Harris property constitutes a change that affects the projected disposable income calculation.

B. Expenses for Surrendered Collateral

The parties dispute whether expenses for collateral being surrendered in a chapter 13 plan may be included in the calculation of the debtors’ disposable income. The court agrees with the Bankruptcy Appellate Panel for the Sixth Circuit’s recent decision in *In re Thomas* on this issue:

The Panel has not located any clearly expressed legislative intention that secured debt expenses deducted from the means test in chapter 7 should be different from secured debt expenses deducted from the disposable income test in chapter 13. Therefore, a chapter 13 debtor may deduct, for purposes of determining *disposable income* under § 1325(b)(2), payments for collateral the debtor intends to surrender.

Hildebrand v. Thomas (In re Thomas), 395 B.R. 914, 922 (B.A.P. 6th Cir. 2008) (emphasis in original). Therefore, the debtors’ deductions for the Harris property expenses on form 22C are correctly included in their calculation of disposable income. Based on their form 22C as filed, the debtors have negative disposable income of \$823.99 per month. However, *Thomas* explained that:

The surrender issue is only relevant to a determination of the Debtors’ disposable income under § 1325(b)(2). This Panel finds that disposable income must then be compared to the Debtors’ projected disposable income, as reflected in Debtors’ income and

expenses as of the effective date of the plan, as required by § 1325(b)(1)(B).

Id. The Panel noted that disposable income and projected disposable income will be the same at confirmation as on the petition date, if in the sixth months before the filing, a debtor's income and expenses are constant. However, where income or expenses have changed, projected disposable income can also change:

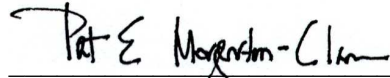
For example, if the debtor's Schedule J reflects a rental expense rather than a mortgage payment, and the plan makes no provision for payment of a mortgage, the calculation of projected disposable income will not include a deduction for a house the debtor intends to surrender, even though the debtor took the deduction under the means test set forth in § 1325(b)(2).

Id. at 923. In *Thomas*, the debtors sought confirmation of a plan with a monthly payment of \$250.00, when form 22C calculated negative disposable income, and their net monthly income from schedules I and J was \$1,083.00 per month. Based upon its view of projected disposable income, the Panel held that on an objection to confirmation, "the court *may not* confirm the plan if the court finds that debtor's schedules or other credible evidence require a reassessment of disposable income as determined by the means test under § 1325(b)(2) and (b)(3)." *Id.* (emphasis in original).

In this case, "other credible evidence" exists that requires the debtors' disposable income from form 22C to be reassessed. Because the debtors intend to surrender the Harris property, the expenses for it cannot be included in the calculation of the debtors' *projected* disposable income. The plan cannot, therefore, be confirmed as proposed.

V. CONCLUSION

For the reasons stated, the trustee's objection to confirmation is sustained, and confirmation is denied. A separate order consistent with this opinion will be entered.



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

CERTIFICATE OF NOTICE

District/off: 0647-1
Case: 08-17408

User: vdomb
Form ID: pdf977

Page 1 of 1
Total Served: 5

Date Rcvd: May 01, 2009

The following entities were served by first class mail on May 03, 2009.

db/db +John V Gendrich, Jana A Gendrich, 19195 Abby Avenue, Euclid, OH 44119-1736
ust +Cynthia J. Thayer, US Department of Justice, 201 Superior Avenue, Suite 441,
Cleveland, OH 44114-1234
cr +AES/PHEAA, PO BOX 8147, HARRISBURG, PA 17105-8147
cr +ECMC, 7325 Beaufont Springs, #200, Richmond, VA 23225-5563
cr +WELLS FARGO BANK, N.A., c/o Shapiro and Felty, L.L.P., 1500 West Third Street, Suite 400,
Cleveland, OH 44113-1438

The following entities were served by electronic transmission.

NONE.

TOTAL: 0

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cr Deutsche Bank National Trust Company

TOTALS: 1, * 0

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I, Joseph Speetjens, declare under the penalty of perjury that I have served the attached document on the above listed entities in the manner shown, and prepared the Certificate of Notice and that it is true and correct to the best of my information and belief.

Meeting of Creditor Notices only (Official Form 9): Pursuant to Fed. R. Bank. P. 2002(a)(1), a notice containing the complete Social Security Number (SSN) of the debtor(s) was furnished to all parties listed. This official court copy contains the redacted SSN as required by the bankruptcy rules and the Judiciary's privacy policies.

Date: May 03, 2009

Signature:

